

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-183466

DATE: November 7, 1975

MATTER OF: MRL, Inc.

DIGEST:

1. Where protest against sole-source procurement was denied by agency on basis that protester's equipment did not meet Government's needs, but protester did not file protest with GAO within 5 days of agency's denial, protest not untimely since protester was advised that there would be amendment to invitation adding names of other acceptable suppliers and evidence is unclear as to whether agency advised protester that amendment related to another firm's equipment only and that protester's equipment would not be considered, protester being under impression that agency was reevaluating its equipment.
2. Where invitation was issued on brand name only basis without "or equal" provision and subsequent evaluation of other suppliers indicated that another source could supply equipment meeting needs of Government, cancellation of procurement and resolicitation on "brand name or equal" basis as requested by protester is not warranted since second source was given opportunity to compete and evidence of record does not indicate that any other firm, other than two acceptable sources, would have submitted bids offering equipment meeting needs of Government. Moreover, protester's equipment was evaluated and determined not to meet Government's needs.
3. In ASPR § 1-1206.1(b) provision that words "or equal" should not be added when it has been determined that only particular product meets essential requirements of Government, words "particular product" mean product of single manufacturer, not "particular" type product manufactured by more than one manufacturer.
4. Where agency properly determines its minimum needs can be satisfied only by a single source the procurement should be negotiated rather than advertised as agency will be in better position to determine reasonableness of prices through examination of pertinent cost data not otherwise available under advertising procedures.

MRL, Inc., has protested the possible award of a contract to Wells Fargo Alarm Services (Wells Fargo) on a sole-source basis under invitation for bids (IFB) DACA31-75-B-0004, issued by the Department of the Army, Baltimore District, Corps of Engineers.

The above invitation, issued on October 22, 1974, was for the procurement of an intrusion detection system to be furnished and installed in one of several buildings constructed under previous contracts at Harry Diamond Laboratories, Adelphi, Maryland. The invitation provided as follows:

"All monitoring panel consoles and equipment in the monitoring panel consoles shall be the manufacture of Wells Fargo Alarm Services and no other. All other equipment interfacing with the monitor panel consoles shall be compatible with the Wells Fargo monitor panel consoles system. No substitution for Wells Fargo equipment as specified above, will be approved or accepted."

According to the Determination and Finding (D&F) prepared pursuant to section 3-210.3 of the Armed Services Procurement Regulation (ASPR) (1974 ed.), procurement of Wells Fargo equipment on a sole-source basis was necessary because standardization of this equipment and interchangeability of its parts are necessary in the public interest. The D&F explains that the equipment to be procured under the present procurement will form an integral part of an already existing Wells Fargo system, which was installed under the Phase I construction contract at Harry Diamond Laboratories facilities, and it is anticipated that there will be a future procurement of Wells Fargo equipment for installation in additional facilities to be constructed at Harry Diamond Laboratories. The D&F further explains that since various types of techniques can be employed in the manufacture of equipment of this type, any system other than that presently being used could present such variations in the physical characteristics of its parts, and in its performance, as to preclude standardization and interchangeability of its parts. It was also pointed out that standardization and interchangeability were necessary to (1) assure the readiness, maintainability and reliability of the equipment; (2) materially reduce the quantity of spare and repair parts required to be carried; (3) make possible the exchange of parts when required; and (4) facilitate expansion of the security system into other areas.

In his report, the contracting officer also states that there is a necessity for using Wells Fargo or an interchangeable system since the guards, who will sit at the monitor panels, are individuals of limited education and are not trained in the workings of a

sophisticated intrusion detection system. Thus, it is maintained, if a guard were to receive dissimilar or conflicting signals from the panels of different manufacturers, he might become confused and a serious security breach could occur.

By telegram of November 21 and letter of November 21, 1974, MRL protested to the agency the sole-source nature of the procurement stating that the procurement should be "brand name or equal" or by specification. MRL stated that other suppliers could meet the requirements of the specifications. We are advised that in order to resolve the protest, it was decided that an investigation of the user's requirements and the availability of alternate systems should be conducted.

In this regard, the record indicates that following the original construction at Harry Diamond Laboratories under Phase I, proposals were solicited for an intrusion system to be installed in that facility. According to the contracting officer, specifications for that system were the same as those included in the present solicitation, except that the source of the equipment was not specified, it being the position of the user that any equipment meeting the salient characteristics set forth in the specifications would be acceptable for the first installation. MRL submitted the lowest price. However, MRL's proposal was rejected for failure to meet the salient requirements of the technical specifications, and a contract was awarded to Wells Fargo on April 1, 1972. MRL protested the rejection of its proposal to this Office and, in B-175770, January 19, 1973, we denied MRL's protest, noting that there were several areas in which MRL's proposal was deficient. According to the contracting officer, MRL is offering the same system for identical specifications. Accordingly, the contracting officer concluded that the system offered by MRL under the present procurement was not acceptable and, on January 23, 1975, the General Counsel, Corps of Engineers, rendered a decision denying MRL's protest of November 21, 1974.

While the contracting officer concluded that MRL's system was unacceptable, his evaluation of other suppliers led him to the conclusion that the system offered by International Research Associates (IRA) was in every respect compatible and interchangeable with that of Wells Fargo and thus was entitled to be considered as an alternative system to Wells Fargo. By amendment 0005 to the solicitation, a proviso was added permitting bidders to offer

either IRA or Wells Fargo equipment. The amendment also provided for a new bid opening date of April 2, 1975. By letter of March 27, 1975, MRL lodged a protest with our Office raising the same points as had been raised in connection with its protest of November 21 with the Corps of Engineers. Bids were opened, as scheduled, on April 2, 1975, and Wells Fargo submitted the low bid. MRL did not submit a bid.

Pursuant to section 2-407.8(i) of the Army Procurement Procedure the contracting officer submitted, through command channels, a request dated April 16, 1975, for authority to award a contract under the solicitation notwithstanding the pendency of a protest before this Office. We are advised that on June 19, 1975, award was authorized by higher authority.

We must first consider the contracting officer's contention that MRL's protest is untimely. In support of this contention he points out that MRL's protest filed with the Corps of Engineers on November 21, 1974, was denied on January 23, 1975, and that MRL was notified of this action by letter dated February 6, 1975. At this point, so the contracting officer contends, MRL was on notice that the procurement would not be changed so as to allow award on a brand name or equal basis and that it (MRL) would not qualify as a source of supply under the specifications. The contracting officer states that the letter of February 6 was notification of adverse agency action and began the running of the 5-day GAO protest period provided for in 4 C.F.R. § 20.2(a) (1975) and since MRL's protest was not filed with our Office until March 27, 1975, it was untimely. Further, the contracting officer maintains that the Government's inclusion of the IRA equipment as an alternative for the Wells Fargo equipment had no material effect on the issues raised in MRL's initial protest.

We have been advised by MRL that the reason it did not lodge a protest with our Office sooner was that it had been notified by the Corps of Engineers that there would be an amendment to the solicitation. The record is unclear as to exactly what advice or information was given MRL concerning the amendment. MRL apparently felt that the amendment might be a change in the Corps of Engineer's position concerning MRL's product which had been determined to be unacceptable. While MRL's protest was denied and MRL was notified of this action on or about February 6, 1975, there is no evidence of record to indicate that the Corps of Engineers advised MRL specifically that the amendment concerned IRA's equipment only,

and that under no circumstances would it accept MRL's equipment. For this reason, our Office is not convinced that MRL's protest is untimely, since if the Corps of Engineers was reevaluating its position in regard to MRL's equipment, a protest filed here would have been premature. Consequently, the protest will be considered.

By letter of April 15, 1975, MRL supplemented its protest, which it had lodged here, stating that the present procurement was in violation of ASPR § 1-1206.1. MRL states that ASPR § 1-1206.1 provides, with certain exceptions, that a specification shall not be written so as to specify a product, or a feature of a product. MRL points out that the exception relied on by the procuring activity to procure Wells Fargo equipment on a sole-source basis was that only a particular brand name product (Wells Fargo) would meet the requirements of the Government. MRL maintains that this exception is no longer valid since it has been determined that IRA's equipment is also acceptable.

ASPR § 1-1206.1 states, in pertinent part, as follows:

"Purchase descriptions shall not be written so as to specify a product, or a particular feature of a product, peculiar to one manufacturer and thereby preclude consideration of a product manufactured by another company, unless it is determined that the particular feature is essential to the Government's requirements, and that similar products of other companies lacking the particular feature would not meet the minimum requirements for the item. Generally, the minimum acceptable purchase description is the identification of a requirement by use of brand name followed by the words 'or equal.' This technique should be used only when an adequate specification or more detailed description cannot feasibly be made available by means other than reverse engineering (see 1-304) in time for the procurement under consideration. Purchase descriptions of services to be procured should outline to the greatest degree practicable the specific services the contractor is expected to perform.

"(b) The words 'or equal' should not be added when it has been determined in accordance with (a) above that only a particular product meets the essential requirements of the Government, as, for example, (i) where the required supplies can be obtained only from one source; (ii) procurements negotiated under 3-207 for specified medicines or medical supplies where it has been determined that only a particular brand name product will meet the essential requirements of the Government; or (iii) procurements negotiated under 3-208 for supplies for resale where it has been determined by a selling activity that only a particular brand name product will meet the desires or preferences of its patrons."
(Empahsis added.)

The contracting officer disagrees with MRL's contention that a product cannot be a "particular product" as defined by the above regulation, unless no more than one party is capable of furnishing the product. The contracting officer contends that:

"* * * A particular product is definable, distinct entity which differs from others of the same kind. The same kind in this instance, is monitor panel consoles and equipment in general. The definable distinct entity in this instance is monitor panel consoles and equipment in the monitor panel consoles, which are compatible and interchangeable with the Wells Fargo system presently in use. The fact that the consoles and compatible equipment can be procured by the government from two separate sources does not negate the fact that the consoles and compatible equipment are still a distinct entity and thus a particular product. * * *"

While we are unaware of any definition of "particular product" in connection with ASPR § 1-1206.1(b), we have held that this provision provides that a purchase description utilizing a brand name only may be used where no other item or manufacturer will meet

the agency's needs. See B-152158, November 18, 1963. Moreover, we note that the examples given in ASPR § 1-1206.1(b) as being illustrative of what constitutes a "particular product" refer to either a particular brand name or one source. Also, ASPR § 1-1206.1(a), to which section (b) refers, speaks of a product, or a particular feature of a product, peculiar to one manufacturer. Consequently, we interpret the term "particular product" to mean the product of a single manufacturer, not, as contended by the contracting officer, a "particular" type product manufactured by more than one manufacturer. Thus, in the present case, had the contracting officer been aware of the fact before the invitation was issued, that IRA's product would also meet the Government's needs, he certainly would not have been justified in issuing the invitation on a sole-source basis. Therefore, it would appear that MRL's contention in this regard does have some merit. However, we also stated in the above-cited decision of November 18, 1963, that "where proposals are solicited on a brand name basis without an 'or equal' provision and subsequent information indicates that other manufacturers may be able to produce acceptable items, it has been our opinion that such manufacturers must be given an opportunity to compete." In the present case, IRA was given an opportunity to compete and had MRL offered a system acceptable to the Government, it would have also been allowed to compete.

If there was any evidence of record to indicate that termination of the present award and a resolicitation would result in the receipt of bids from any additional firms, other than IRA and Wells Fargo, offering equipment acceptable to the Government, we would recommend such action and resolicitation on a "brand name or equal" basis. However, since it is the province of administrative officers of the Government, not of this Office, to determine the needs of the Government, and the procuring office has determined, after evaluation of several potential suppliers including MRL, that its needs can only be met by IRA or Wells Fargo equipment, we are of the view that termination of the award and a resolicitation on a "brand name or equal" basis would serve no useful purpose.

MRL contends that the technical deficiencies in its system which resulted in the rejection of the equipment on the Phase I procurement have been corrected. However, the procuring activity has provided the following information based upon MRL's present equipment as justification for its rejection of MRL's equipment:

"1. The MRL monitor panels can be modified to fit into the Wells Fargo monitor panel console. The Wells Fargo monitor panels will not fit into the MRL console. Thus, once an MRL console panel is installed, the user must continue to use the MRL panels exclusively in the MRL console. For maximum interchangeability it is essential that the new monitor panel consoles installed in this facility have the capacity of accepting monitor panels being used in the already existing system.

"2. In order to test the monitor panels when malfunctions occur, the testing must be performed on an extender board. One cannot use the same extender board to test the MRL and Wells Fargo panels.

"3. The methods of testing and repairing the MRL and Wells Fargo Systems differ. A mechanic trained in the operation of the Wells Fargo system could not, without specialized training, carry out the repair and testing of an MRL system. If both systems were in operation, mechanics would have to be trained in both systems. To assure economy and efficiency of maintenance, the user needs the simplicity of a uniform maintenance procedure.

"4. The MRL monitor panel consoles do not have a key lock system for the panels. On the MRL console, the individual monitor panels can be removed by unscrewing two screws on the front of each panel. The Wells Fargo system and IRA system have a key lock which must be opened before any individual panel can be removed.

"5. The Wells Fargo system operates off of a 6-volt power supply while the MRL system operates off of a 12-volt power supply, ... Thus, in order to place a MRL panel into the Wells Fargo console, an adjustment in voltage must be made to each individual panel."

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Accordingly, we find no basis to disagree with the contracting officer's determination that MRL's equipment will not meet the Government's needs.

For the above reasons, MRL's protest is denied.

However, by separate letter of this date, to the Secretary of the Army, we are recommending that where it is properly determined that only a single source can satisfy its minimum needs, as was the initial determination in this case, negotiation rather than formal advertising be used to effectuate the procurement as the agency will be in a better position to determine the reasonableness of proposed contract prices through examination of pertinent cost data not otherwise available under formal advertising procedures.


Acting Comptroller General
of the United States